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No. 93-518

In the

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Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,
Petitioner,

v.

CITY OF TIGARD,
Respondent.

**On Writ of Certiorari to the
Supreme Court of the State of Oregon**

**BRIEF AMICUS CURIAE OF PACIFIC
LEGAL FOUNDATION, RICHARD K.
EHRlich, AND BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON IN
SUPPORT OF FLORENCE DOLAN**

JOHN M. GROEN

Pacific Legal Foundation
10800 N.E. 8th Street,
Suite 325

Bellevue, Washington 98004
Telephone: (206) 635-0970

RONALD A. ZUMBRUN

ROBIN L. RIVETT

JAMES S. BURLING

*DEBORAH J. LA FETRA

*Counsel of Record

Pacific Legal Foundation

2151 River Plaza Drive, Suite 305

Sacramento, California 95833

Telephone: (916) 641-8888

Attorneys for Amici Curiae

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal
Foundation (PLF), Richard K. Ehrlich, and the Building
Industry Association of Washington (BIA-Washington)

respectfully submit this brief amicus curiae in support of appellant Florence Dolan. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the nation and maintains its principal office in Sacramento, California. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); and *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992).

Richard K. Ehrlich is a property owner who, as a condition for a permit to build condominiums, was required to pay a \$280,000 fee to help finance Culver City's public recreation facilities. Mr. Ehrlich was singled out to pay this fee because the land on which he desired to build condominiums formerly housed a private health club. Additionally, the city required the payment of a \$33,220 fee to fund its "art in public places" program. The city assessed

the arts fee in violation of First Amendment Free Speech guarantees as well as the Takings Clause. While Mr. Ehrlich is required to subsidize the art, the artist maintains ownership and the city decides what art (and what message) will be displayed. The California Court of Appeal upheld these exactions without requiring a demonstration that they were designed to mitigate any public burden created by Ehrlich's project. *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737 (1993), petition for writ of certiorari filed November 24, 1993. Mr. Ehrlich's case represents a California court's misinterpretation of *Nollan's* requirement that an "essential nexus" exist between the public burden caused by the project and the exaction. The misinterpretation of this necessary close relationship (essential nexus) is one of the critical issues in Mrs. Dolan's case now before this Court (the other critical issue being the required application of heightened scrutiny).

The Building Industry Association of Washington is a federation of regional and local associations representing over 4,600 members engaged in commercial and light industrial construction and the building of most of Washington's residential housing. The interest of BIA-Washington in this case is to ensure that government exactions levied on construction projects in the permit process are fairly imposed and predictable. The case at bar directly calls into question how direct and substantial the nexus must be in order to impose conditions on a construction project. Accordingly, the ruling in this case will have substantial ramifications for the construction industry and the interests of BIA-Washington members.

Amici seek here to augment the argument in the petition for writ of certiorari. PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. Mr. Ehrlich's personal experiences and BIA-Washington's practical knowledge of the hurdles local governments erect for

developers provide further viewpoints on these issues that may be helpful to this Court.

This case, like *Nollan*, raises the question of whether a condition requiring dedication of land in exchange for a building permit can be harmonized with the Fifth Amendment's Takings Clause when the exaction bears no discernible relationship to an impact created by the building project.¹ Some local and state governments, such as the City of Tigard and Culver City, as well as some courts acknowledge only the bare existence of the *Nollan* decision. Instead of following the guidelines set forth in that case, however, they attempt to avoid it, purportedly by distinguishing *Nollan* as to its facts, or claiming alternatively that *Nollan* applies only to "possessory takings" or only to permit exactions of interests in real estate rather than cash.

Amici believe the opinion below directly conflicts with this Court's decision in *Nollan* and other regulatory takings cases. If allowed to stand, the opinion below will constitute a serious setback for individual rights by undermining the constitutional prohibition against taking private property without just compensation. This result would abridge fundamental notions of fairness and equity by unconscionably tipping the constitutional balance in favor of the state's regulatory power over the rights of the individual.

STATEMENT OF THE CASE

Florence Dolan owns a plumbing supply store in the City of Tigard, Oregon. She applied to the city for a permit to replace her existing store with a new, expanded store (a use contemplated by and fully within zoning requirements for

¹ Richard Ehrlich's case represents the corollary to that issue: whether the same analysis applies to an exaction of money or fees imposed in exchange for a building permit under the Fifth Amendment's Takings Clause.

the site). The city informed Mrs. Dolan that she could have the permit on two conditions. First, she would have to dedicate a 15 foot wide strip of land to the city for use as a greenway easement running along Fanno Creek. This dedication requirement comprised about 7,000 square feet, or approximately 10% of Mrs. Dolan's parcel. Second, she would have to dedicate an additional eight foot wide strip adjacent to the greenway for a pedestrian/bicycle pathway.

The greenway easement was required so as to further the objectives of the city's Master Drainage Plan which called for public improvements related to increasing the flow efficiency of Fanno Creek. Indeed, the city's final order on Mrs. Dolan's request for a variance stated that dedication of the easement was "imperative" to accomplishing these public improvements. Petition for Writ of Certiorari Appendix A (App.) at A-22.

Similarly, the bicycle path easement was imposed so that there would not be a break in the planned continuous pathway called for in the city's Parks Master Plan and the Tigard Area Comprehensive Pedestrian/Bicycle Pathway Plan 1974. The city's order denying a variance again reveals the rationale.

"It is imperative that a continuous pathway be developed in order for the paths to function as an efficient, convenient, and safe system. Omitting a planned for section of the pathway system, as the variance would result in if approved, would conflict with Plan purposes and result in an incomplete system."

App. at A-22 (citing Final Order No. 91-09PC at 9-22 (1991)).

In reviewing these conditions, the Oregon Supreme Court held that the conditions were "reasonably related" to the proposed development and therefore did not effect a taking without compensation in violation of the Fifth

Amendment. The court determined that *Nollan's* "essential nexus" requirement was satisfied since a larger store would increase impervious surface area and therefore presumably would increase the amount of storm water runoff into Fanno Creek. Similarly, the court was persuaded that an expanded plumbing supply business would increase the transportation needs of employees and customers and the bicycle pathway was an alternative means of transportation which could lessen traffic congestion. App. at A-16-A-17.

Significantly, the court upheld these dedication requirements as being "reasonably related" to the project even though the city had no site-specific studies or other evidence to show that Mrs. Dolan's project would cause any significant, or even measurable, drainage problems on Fanno Creek. Likewise, there was no factual showing whatsoever of increased traffic congestion related to the anticipated store expansion or whether a bicycle path would in any way alleviate traffic coming to the plumbing supply store. Nevertheless, the tenuous (and speculative) link was considered by the Oregon court to be sufficient to justify taking 10% of Mrs. Dolan's property for a drainage greenway easement and an additional 8 foot strip for a bicycle pathway.

SUMMARY OF ARGUMENT

The Oregon Supreme Court erred in its analysis and application of this Court's takings law decisions, specifically *Nollan v. California Coastal Commission*. A condition on a building permit should be uniquely and specifically attributable to the burdens created by a proposed development. This promotes the underlying policy of requiring local governments to pay for the services they wish to offer rather than imposing the whole cost on a few property owners whose proposed developments unfortunately abut proposed public improvements. Contrary to the rulings

of this Court, the Oregon Supreme Court failed to require that building permit conditions mitigate burdens uniquely and specifically attributable to the proposed development, thus giving the green light to local governments seeking to acquire private property without paying just compensation. The court below denied Mrs. Dolan compensation for the portion of her land taken by the government, even while it failed to find an essential nexus between the burdens created by Mrs. Dolan's project and the need for a pedestrian/bicycle pathway or a floodplain greenway.

Moreover, despite *Nollan's* requirement that courts apply heightened scrutiny to regulatory takings claims (reiterated in *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153 (1992), and *Lucas*), the Oregon Supreme Court deferred entirely to the so-called findings made by a local land use regulatory agency. Unfortunately, the Oregon court is not the first to misconstrue *Nollan* in this manner. Jurisdictions' widely varying interpretations of *Nollan*, some of which are in line with that seminal case and others which declare the case virtually irrelevant, have added to the confusion of determining the proper standard. For the reasons described below, the decision of the Oregon Supreme Court should be reversed and this Court should expressly hold that lower courts must apply heightened scrutiny to regulatory takings claims to assure that conditions imposed on property owners have an essential nexus uniquely and specifically attributable to the burdens created by the proposed development.

ARGUMENT

I

**A CONDITION ATTACHED TO A BUILDING
PERMIT SHOULD BE UNIQUELY AND
SPECIFICALLY ATTRIBUTABLE
TO THE BURDENS CREATED BY
THE PROPOSED DEVELOPMENT**

The City of Tigard determined that property having the general character and located in the general vicinity of Mrs. Dolan's store should be used to provide bicycle and pedestrian pathways and open space for the public good. App. at A-7-A-8. This finding may be legitimate but, unfortunately, the city decided to further these public goals at the sole expense of the property owners whose property lies nearest to the sites of the city's plans. Singling out particular property owners to bear burdens rightly borne by the public as a whole violates the Takings Clause of the Fifth Amendment of the federal Constitution. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). As demonstrated below, the evolution of takings analysis in response to such governmental overreaching requires that permit conditions mitigate only those adverse societal burdens uniquely and specifically attributable to the proposed development.

**A. *Nollan v. California Coastal Commission*
Provides the Ground Rules for Analyzing
Permit Conditions Challenged as Takings**

Nollan noted the existence of a bright-line test: if a regulation does not "substantially advance"² a legitimate

² [O]ur opinions do not establish that [takings] standards are the same as those applied to due process or equal protection claims. To the
(continued...)

state interest, there is a taking. *Nollan*, 483 U.S. at 834 (citing one of two independent tests in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).³ This Court explained that a regulation in the form of a permit condition meets this "'substantially advance'" requirement if two prerequisites are met: first, the government must be able to deny the permit outright due to the harm caused by the project.⁴ Second, the "permit condition [must] serve[] the same legitimate police-power purpose as a refusal to issue the permit." *Nollan*, 483 U.S. at 836. This second prerequisite can be interpreted to mean that the permit condition may only be imposed to mitigate harms created by the particular permitted development, those harms being the same ones that would justify denial of the permit. *Id.* at 837. These two

² (...continued)

contrary, our verbal formulations in the takings field have generally been quite different. We have *required* that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State 'could rationally have decided' that the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 835 n.3 (citations omitted; emphasis added and in original).

³ The other bright-line test is the "economically viable use" test which is met when a regulation destroys all economically beneficial or productive use of property. *Agins*, 447 U.S. at 260; *Lucas*, 120 L. Ed. 2d at 813.

⁴ If the denial would cause a drastic reduction in the value of the property the condition might constitute a taking. *Nollan*, 483 U.S. at 835-36.

prerequisites are often referred to collectively as the "essential nexus" requirement. *Id.* at 837.

Unfortunately, this Court left ambiguous the question as to how tight a nexus must exist between the condition and burdens created by the proposed development. In *Nollan*, this Court cited cases that employed nexuses ranging from "rational relationship" to "uniquely and specifically attributable." *Id.* at 839-40 (citing, *inter alia*, *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P.2d 668 (Colo. 1981) (rational relationship), and *Pioneer Trust & Saving Bank v. Village of Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961) (uniquely and specifically attributable)). After this perusal of case law, this Court held that whatever the standard of nexus, the California Coastal Commission's requirements could not pass constitutional muster. *Nollan*, 483 U.S. at 841. To promote greater uniformity of the courts on this extremely important issue, this Court should clarify that the uniquely and specifically attributable nexus is required to protect the constitutional right to receive just compensation for a governmental taking of private property.

B. Traditional Takings Analysis as Well as the Nollan Analysis Demonstrate that the Permit Condition in This Case Results in a Taking

The first question to be addressed is whether under a traditional takings analysis the exaction would constitute a taking. Here, were the city to condemn 10% of the property by a fee simple dedication, Mrs. Dolan would unquestionably be compensated for a taking. The second question is whether, under a traditional takings analysis, the denial of the permit outright would constitute a taking because it deprives the property of economically viable use. *Agins*, 447 U.S. at 260. Even if the permit were denied, Mrs. Dolan would retain the use of the original plumbing supply store. Therefore, denial of the permit to build a larger building would not be a taking so long as the reasons

for the denial of the permit substantially advance a legitimate state interest.

These questions only begin the analysis, however. Under *Nollan*, the "substantial advancement of a legitimate state interest" test is employed to ensure that the government is in fact regulating to avoid adverse public consequences and is not using the regulatory power to acquire property by coercion. This is the central holding of *Nollan*, 483 U.S. at 837 (when "evident constitutional propriety disappears" then the regulation becomes "an out-and-out plan of extortion").

The local government must establish the required essential nexus by demonstrating that a particular project has caused a harm to the community which is significant enough to justify denial of the permit. As an alternative to the denial, government may then grant the permit with specific conditions designed to ameliorate the harm.

Courts are intended to view infringements on property rights very seriously. As the *Nollan* Court warned:

We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination.

Nollan, 483 U.S. at 841. This Court reiterated this cautionary message in *Lucas*, 120 L. Ed. 2d at 819 n.12, which warned that "artful ... characterizations" would be insufficient to demonstrate substantial advancement of a legitimate state interest.

Disregarding the plain teachings of this Court, the Oregon Supreme Court declined to apply any meaningful scrutiny to the permit conditions at issue. The court below merely identified a preexisting public need or purpose and determined that imposition of the land exaction would serve that purpose.

Because the exaction gives the government property it would otherwise have to pay for, the city has a specific, direct interest in creating the appearance of regulation to hide its intention to circumvent the Takings Clause in acquiring the property. The nexus standard must require that the condition be tied to burdens uniquely and specifically attributable to the proposed development. Only this standard is sufficiently rigorous to penetrate a deliberately deceptive facade of regulation.

C. The Oregon Supreme Court's Failure To Require That Conditions Mitigate Burdens Uniquely and Specifically Attributable to the Proposed Development Gives the Green Light to Local Governments Seeking To Acquire Private Property Without Paying Just Compensation

Missing from the Oregon Supreme Court's decision is any analysis of whether the City of Tigard would be justified in denying Mrs. Dolan's permits on the basis of increased bicycle or pedestrian traffic or increased need for storm drainage. A bicycle and pedestrian path as well as more storm drainage are presumably legitimate interests of the City of Tigard. However, making Mrs. Dolan contribute to these interests is legitimate only if denial of the permits would be justified on the ground that the project would actually interfere with these interests.

The court below justifies its minimal analysis by finding that *Nollan* only imposes a "reasonable relationship" standard (rather than a substantial advancement standard) for determining the permissibility of imposing conditions responsive to the impacts of particular developments. App. at A-13-A-14. The court justifies this standard by reference to two Ninth Circuit Court of Appeals' decisions: *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), and *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), cert. denied, ___ U.S. ___,

118 L. Ed. 2d 593 (1992). *Parks*, of course, predates *Nollan*. Nevertheless, it actually employed an analysis which considered whether the project actually caused any harm or public burden which the conditions imposed on the project by the city would mitigate. The court found no causal relationship whatsoever.⁵ As discussed *infra* at 20-21, *Commercial Builders* misinterpreted *Nollan* by refusing to acknowledge the enhanced standard of review mandated by this Court's opinion.

⁵ In *Parks v. Watson*, 716 F.2d 646, a property owner sought to have a city vacate platted but unbuilt streets so apartments could be built. The city agreed to "vacate" the nonexistent streets only on the condition that the property owner give to the city property containing valuable geothermal wells. The court quickly concluded that the city's desire to own the geothermal wells did not entitle it to extort dedication of the wells because of the fortuitous appearance of their owner seeking a permit to undertake activity unrelated to geothermal wells:

Since the requirement that Klamath Valley Company give its geothermal wells to the City had no rational relationship to any public purpose related to the vacation of the platted streets, the unrelated purpose does not support the requirement that the company surrender its property without just compensation. ... The condition violates the fifth amendment.

Parks, 716 F.2d at 653.

1. The Court Below Did Not Find an Essential Nexus Between the Burdens Created by Mrs. Dolan's Project and the Need for a Pedestrian/Bicycle Pathway

In this case, heightened scrutiny will bear out the fact that no nexus (much less an essential one) exists between the city's conditions of a greenway and pedestrian/bicycle pathways and the impacts to be created by Mrs. Dolan's expanded plumbing supply store. The city provided no data or information and conducted no study whatsoever to support its conclusions. Instead, the city simply made deductions and assumptions based on its own sense of logic and nothing more. The city's findings stated:

It is reasonable to *assume* that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs. ... In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic, thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.

App. at A-5 (emphasis added).

The fact that the pathway *could* be used is nothing more than supposing that having a pathway is a good idea and will benefit Mrs. Dolan's customers and employees, as it will benefit every other citizen of the City of Tigard. The findings of fact that the bicycle pathway system "'could offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will*, or is *likely to*, offset

some of the traffic demand." App. at A-25 (Peterson, J., dissenting) (emphasis in original). Moreover, even the assumption of additional burden on traffic thoroughfares is speculative. The city has produced no studies demonstrating that the city's current traffic arteries are insufficient to handle whatever additional traffic congestion may result from the existence of a larger plumbing supply store.

Certainly, the City of Tigard could not have denied Mrs. Dolan's permit on the grounds that her customers' and employees' recreational needs were not being met. No nexus or reasonable relationship exists between the new development of an enlarged plumbing supply store and its customers' recreational needs. The city theoretically should have shown (if possible) that it could have denied Mrs. Dolan's permit on the ground that her project would increase traffic. The city should have further demonstrated that as an alternative to denying the permit, the bicycle/pedestrian pathway funded by Mrs. Dolan would do no more than alleviate the traffic congestion caused by her project. So far, the City of Tigard's articulations have shown a presumed connection which is nothing more than "an exercise in cleverness and imagination." *Nollan*, 483 U.S. at 841.

2. The Court Below Did Not Find an Essential Nexus Between the Burdens Created by Mrs. Dolan's Project and the Need for a Floodplain Greenway

In regard to the floodplain dedication, the court below relied on the city's findings that

"[t]he increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods

of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes."

App. at A-6. This finding only acknowledges that the City of Tigard has an existing problem with this drainage basin and the enlarged store and parking lots' increased surface area *could* add to this problem. As Justice Peterson noted in dissent, the contribution of this project to runoff may be only a "thimbleful." App. at A-26 (Peterson, J., dissenting). The city must show that the granting of the permit will create specific problems, burdens, or conditions that previously did not exist. The city must then show that the exaction will serve to alleviate the specific problems, burdens, or conditions that will arise from the granting of the permit. General statements of concern about increased traffic or public safety are insufficient to support, as permissible regulation, what otherwise would be a taking. App. at A-18-A-19 (Peterson, J., dissenting).

In the present case, the city's desires to construct a greenway and bike trails are totally unrelated to any burden created by Mrs. Dolan's proposed expansion of her plumbing supply store. When the city's exactions are subjected to the heightened scrutiny required by *Nollan*, it is apparent that its actual purpose is identical to that of the condition demanded by the California Coastal Commission: "[T]he obtaining of an easement to serve some valid governmental purpose, but without payment of compensation." *Nollan*, 483 U.S. at 837. The government must show much more than a theoretical nexus; it must show that the condition will mitigate societal burdens uniquely and specifically attributable to the proposed development.

II

NOLLAN V. CALIFORNIA COASTAL COMMISSION REQUIRES COURTS TO APPLY HEIGHTENED SCRUTINY

A. This Court's Decisions Have Uniformly Required Heightened Scrutiny of Regulatory Takings Claims

Whatever nexus requirement is used, the next step in the analysis is how courts should review the determination by the local government that it has met the required nexus. In *Nollan*, this Court reviewed the nexus with "particular care[]" because of the risk that the government's purpose "is avoidance of the compensation requirement, rather than the stated police power objective." *Nollan*, 483 U.S. at 841. This "particular care[]" has been described by courts and commentators as heightened scrutiny. See, e.g., *Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1068 (N.Y.), cert. denied, 493 U.S. 976 (1989); Lawrence Berger, Inclusionary Zoning Devices as Takings: *The Legacy of the Mount Laurel Cases*, 70 NEB. L. REV. 186, 210 (1991) ("[i]t was Justice Scalia's use of the language of intermediate heightened scrutiny, in connection with a takings analysis ... that marks the importance of the *Nollan* case"). Courts must apply heightened scrutiny to the facts to confirm that the standard was met. This heightened scrutiny requires a degree of proof by the government agency rather than simply an "exercise in cleverness and imagination" or a mere "pleading requirement." *Nollan*, 483 U.S. at 841. When courts apply heightened scrutiny, local governments will be unable to create an artificial appearance of legitimate regulatory conduct to cover their action in acquiring property for other purposes.

It all comes down to a simple point: The city wants pathways and greenway easements and it wants someone else to pay for them. *Nollan*'s nexus requirement should not be

transmuted into a rule of the convenient patsy. Application of heightened scrutiny will assure this does not happen.

B. Jurisdictions' Widely Varying Interpretations of Nollan Have Added to the Confusion over the Proper Standard

1. Some Jurisdictions Have Correctly Described and Applied the Nollan Standard

a. The New York Court Demonstrated Correct Understanding and Analysis of Heightened Scrutiny Under Nollan

The New York Court of Appeals struck down a law requiring the imposition of a monetary exaction on hotel owners who wanted to stop using their hotels as single room occupancy, low rent housing. The court held:

[Regulatory takings challenges require] "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships" as articulated in *Nollan*.

Seawall Associates v. City of New York, 542 N.E.2d at 1068. Analyzing the law, the court noted that the city's asserted nexus between the obligation placed on the property owners and the state interest was "indirect at best and conjectural." *Id.* at 1069. The conjectural nature of the connection was so tenuous that the court found it could not justify singling out the property owners to bear the costs of curing a larger societal ill--in that case, homelessness. *Id.* In the case now before this Court, the speculative musings of the City of Tigard are insufficient to demonstrate the required essential nexus.

b. The New Jersey Court Correctly Stated Nollan's Heightened Scrutiny

The New Jersey Supreme Court has also explicitly recognized the heightened scrutiny requirement of *Nollan*:

[T]he United States Supreme Court has acknowledged that the "rationality" standard determinative of substantive-due-process challenges to State regulation is less stringent than the "takings" standard, which requires that the taking "substantially advance" the State interest to be achieved.

In the Matter of the "Plan for Orderly Withdrawal from New Jersey" of Twin City Fire Insurance Company, 609 A.2d 1248, 1259 (N.J. 1992), *cert. denied*, ___ U.S. ___, 122 L. Ed. 2d 370 (1993) (citing *Nollan*, 483 U.S. 825).

c. A California Court Has Similarly Recognized the Heightened Scrutiny Requirement

Even California--whose courts were singled out in *Nollan* as particularly hostile to property rights--has produced a decision acknowledging and applying the enhanced standard that *Nollan* requires.

Nollan ... changed the standard of constitutional review in takings cases. Whether the new standard is described as "substantial relationship," or "heightened scrutiny," it is clear the rational basis test ... no longer controls.

Surfside Colony, Ltd. v. California Coastal Commission, 226 Cal. App. 3d 1260, 1270 (1991) (footnotes omitted). This California Court of Appeal decision provides a good example of a court properly applying the *Nollan* test to conditions imposed on a permit to place a revetment on oceanfront property. The plaintiff challenged the dedication of an easement for public access along the beach. In evaluating these conditions, the court reviewed generic studies relied on by the Coastal Commission which indicated

⁶ *Nollan*, 483 U.S. at 839.

that such revetments "typically exacerbate erosion of the beach in front of them." *Surfside Colony*, 226 Cal. App. 3d at 1265. Nevertheless, the Court of Appeal concluded that the dedication condition effected a taking of the property because

the Commission had no evidence at all establishing *this* revetment would cause erosion at *this* beach.

We must therefore conclude no substantial evidence exists to justify a "nexus" between the revetment and the public access requirement. Under *Nollan* the access requirement must be deemed a "taking" of Colony's property.

Id. at 1269 (emphasis added). The court in *Surfside* understood that *Nollan* requires far more than an assumed relationship between the condition and the need created by the development. Because the "nexus" between the actual development and the condition must be substantial, the court concluded that "[w]ithout any site-specific evidence supporting the Commission's decision, we cannot say the Commission had 'substantial evidence' justifying the need for an easement over Colony's property." *Id.* at 1272.

2. Other Jurisdictions Have Misanalyzed, Misinterpreted, and Misapplied the *Nollan* Standard of Review

Recently, some lower courts (especially the Ninth Circuit) have blatantly misinterpreted *Nollan*. For example, in *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, instead of comparing the permit condition (a fee to fund low-income housing) and the applicants' projects (commercial buildings), the Ninth Circuit Court of Appeals deferred to the city "because we find the Ordinance sufficiently related to the legitimate purpose it seeks to achieve" (*i.e.*, "expanding low-income housing"). *Id.* at 873.

The relationship which that court found sufficient departs from the *Nollan* doctrine. As previously noted, *Nollan* requires courts to find a constitutional nexus between the permit condition and the applicant's proposed project in order to determine whether the condition is truly remedial of adverse impacts caused by the project. Yet, the *Commercial Builders* court wrote:

Prior to *Nollan*, other federal courts ... upheld ordinances placing restrictions or conditions upon development where the ordinances were reasonably related to legitimate public purposes.

....

As a threshold matter, we are not persuaded that *Nollan* materially changes the level of scrutiny we must apply to this Ordinance.

Commercial Builders, 941 F.2d at 874.

In an even more troubling ruling, one California court (attempting to reconcile *Commercial Builders* with the fact that *Nollan* does require heightened scrutiny) proclaimed that *Nollan* does not apply to regulatory takings cases at all. *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164, 170, *cert. denied*, ___ U.S. ___, 121 L. Ed. 2d 135 (1992). In *City and County of San Francisco v. Golden Gate Heights Investment*, 14 Cal. App. 4th 1203, 1209 (1993), *cert. denied*, ___ U.S. ___, 1993 WL 323192, the California Court of Appeal also characterized *Nollan* as a physical takings case. *Id.* at 1209. In support it cited *Blue Jeans Equities* and inexplicably *Yee*, 118 L. Ed. 2d at 167. *Yee*, of course, found the exact opposite. *Id.*

The California courts, with the exception of *Surfside Colony*, discussed *supra*, have continued unabated their pattern of misinterpretation of *Nollan*'s requirements. Amicus Richard Ehrlich has been the victim of one such

opinion which managed to find a justification for the imposition of a \$280,000 recreation fee and a \$33,220 arts fee.⁷ *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737. In *Ehrlich*, the inherent vice of the California Court of Appeal's decision is its conclusion that conditions requiring exactions are acceptable if they (1) advance a legitimate governmental interest and (2) leave a property owner with economically viable use. In reaching this conclusion, the court did not require any showing that the exaction was designed to mitigate any public burden created by the project itself. Indeed, the court stated that the "fee was not imposed as a condition relating to the development project's burden on the community for increased community services," but only because of a "benefit conferred" and the burden from the loss of nonexistent recreational facilities. *Id.* at 1749-50. This reasoning, and the necessary conclusion resulting from it, directly conflict with this Court's mandate in *Nollan*. To return property rights jurisprudence to the right track, this Court should expressly hold that fair application of the Takings Clause requires courts to use heightened scrutiny to

⁷ The arts fee is particularly egregious in its twofold attack on individual constitutional rights. Not only does it violate Mr. Ehrlich's guarantee of just compensation for a regulatory taking, but it also violates Mr. Ehrlich's right of free speech by turning him into a private endowment for the arts. Under the First Amendment, Ehrlich has the right to refuse to subsidize artistic speech with which he disagrees. *Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) ("our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters--to take a nonexhaustive list of labels--is not entitled to full First Amendment protection" (footnote omitted)); *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990).

examine governmental regulations or conditions which adversely impact private property rights.

III POLICY CONSIDERATIONS REQUIRE STRICT ADHERENCE TO NOLLAN

The right to make reasonable use of property, free from extortive governmental demands, involves a matter of individual liberty and a basic civil right which should be jealously guarded by the courts:

Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation ... is in truth a "personal" right In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corporation, 405 U.S. 538, 552 (1972).

The importance of this case is found both in the breadth of its impact and the nature of the issues raised. Even beyond its clear conflict with the standards laid down by this Court in *Nollan*, the city's actions violate the Takings Clause by requiring petitioner alone to bear what should rightfully be a general public burden. In addition to examining the nature of the state action embodied in land use regulations, and its economic impact on property owners, this Court has assigned unique significance to this question of fundamental equity. As noted *supra*, but worthy of reiteration, "[o]ne of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by

the public as a whole.'" *Nollan*, 483 U.S. at 835 n.4 (quoting *Armstrong v. United States*, 364 U.S. at 49). Any presumed benefits of the pedestrian/bicycle pathway and greenway would accrue to the community as a whole. It follows as a general principle of constitutional law that the costs of constructing these pathways and greenways, *including the cost of acquiring the right of way*, must be financed out of general public revenues. The city is prohibited under the Fifth and Fourteenth Amendments of the United States Constitution from requiring individual property owners to bear the costs of its land acquisition program.

In *Nollan*, the Coastal Commission wanted access to the Nollans' beach as part of a comprehensive program to provide continuous public access along Faria Beach as the adjacent lots underwent development or redevelopment. *Nollan*, 483 U.S. at 841. If "Fanno Creek" were substituted for "Faria Beach" and "storm water management and greenway purposes" for "continuous public access," the parallels between *Nollan* and *Dolan* become blatant. This Court's response to the Coastal Commission's justification was that California "is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' ... but if it wants an easement across the Nollans' property, it must pay for it." *Nollan*, 483 U.S. at 841-42 (citations omitted). Oregon apparently needs the same message spelled out for it.

With respect to takings jurisprudence, courts struggle with two essentially opposing tendencies. First is a tendency to recognize the legitimacy of attempts by government to regulate property in ways that once might have been unthinkable. App. at A-26-A-27 (Peterson, J., dissenting). The second tendency (a corollary of the first) is for state and local governments to attempt to further particular goals by conditioning the uses of private property. Property owners are denied their rights to build unless they "dedicate" some portion of their property to support the particular government

program. Governments, therefore, face strong temptations, particularly in times of limited tax revenues, to place the primary burden for funding projects on the shoulders of those whose private property happens to be in the neighborhood of the proposed projects.⁸ As Justice Peterson eloquently stated in his dissent:

The trouble is, what once would have been recognizable as extortion may turn, in time, into something considered benign because it is so familiar. That transmogrification is encouraged every time a court cannot distinguish whether a particular governmental regulation falls within the ambit of the second tendency, rather than the first.

... The findings relating to the need for exactions arising from future increased intensity of use after the property is developed must establish more than a *potential* increase in intensity; they must establish more than *some* increase in intensity; they must establish a bona fide need for the extraction that arises from the development.

App. at A-28 (Peterson, J., dissenting) (emphasis in original).

The only "impediment" to the city's completion of its planned greenbelt and bicycle pathways after construction of Mrs. Dolan's expanded store is the same one which existed before: the land is privately owned. But this Court concluded in a classic opinion that the "impediment" can

⁸ The regulatory takings analysis applies to all types of takings; permit conditions requiring outright dedications, easements, or fees.

only be removed by the constitutional means of purchasing access:

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. ... The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the 14th Amendment. [Citation.] When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).

The rejection of *Nollan's* heightened scrutiny requirement by the court below is more than a simple mistake in the application of federal constitutional law. Rather, it amounts to a denial of fundamental rights guaranteed by the United States Constitution. The appropriate standard of judicial review is not a mere procedural detail. In close cases, the level of scrutiny determines the outcome of litigation. See R. S. Radford, *Statistical Error and Legal Error*, 21 LOY. L.A. L. REV. 843, 870-79 (1988). In the context of regulatory takings, the level of scrutiny determines whether or not individual

property rights will be protected against predatory and confiscatory regulations.

Although *Nollan* explicitly set a heightened standard of review which must be applied to exactions imposed on building permits, lower courts have deliberately circumvented the language in *Nollan* to come to results that cannot be harmonized with that case. For the benefit of those courts which have yet to acknowledge and apply the required heightened scrutiny in takings cases, this Court should clarify this area of the law by reiterating that the *Nollan* analysis requires heightened scrutiny of permit conditions. Under that analysis, in order to pass Fifth Amendment muster, permit conditions must mitigate burdens uniquely and specifically attributable to the subject development.

CONCLUSION

For the reasons stated above, the decision of the Oregon Supreme Court failed to properly apply the takings law doctrines set forth by this Court and should be reversed.

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Respectfully submitted,

JOHN M. GROEN
Pacific Legal Foundation
10800 N.E. 8th Street,
Suite 325
Bellevue, Washington 98004
Telephone: (206) 635-0970

RONALD A. ZUMBRUN
ROBIN L. RIVETT
JAMES S. BURLING
*DEBORAH J. LA FETRA
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive, Suite 305
Sacramento, California 95833
Telephone: (916) 641-8868
Attorneys for Amici Curiae